COURT OF APPEALS.

THE PEOPLE on the relation of FREDERICK W. BARTLETT,

AGAINST

THE MEDICAL SOCIETY OF THE COUNTY OF ERIE.

POINTS OF RELATOR.

STATEMENT OF FACTS.

The relator was admitted to the practice of medicine and surgery by the New York Medical College, and regularly awarded his diploma by the Faculty thereof, on the 28th day of February, 1854. (*Folios* 2, 32, 33.) In April, 1855, he commenced the practice of his profession at Buffalo, Erie county, and has continued the same at that place until the present time. In June, 1859, he caused an application for admission to membership in the Medical Society of the County of Erie to be presented to that body (*fol.* 4, 37.) The Society deferred action until the ensuing annual meeting of January, 1860 (*fol.* 5, 38), when a committee was appointed to hold an interview with the relator and report upon his application. (*fol.* 40, 41.) The interview was had, and the committee reported that the relator had "devoted himself to the treatment of diseases of the throat and lungs, advertising his vocation in the daily and weekly journals of the city, and professing in the advertisment to employ the method of one Robert Hunter of New York; and that on being advised of the impropriety of this course he had withdrawn the advertisement and inserted in its place a card announcing his name, residence and speciality." The

relator had stated to the committee his intention to abandon special and engage in general practice; (*fol.* 8, 43,) and they recommended his admission, (*fol.* 9, 43.)

At the semi-annual meeting of June, 1860, the matter was taken up (*fol.* 7, 8, 44, 48.) A member of the Society read at length a copy of the advertisement extracted from a city paper, which elicited a general discussion of its contents on the part of different members (*fol.* 44, 48.) Some other objections were raised and pressed upon the Society, which have since been abandoned (*fol.* 12, 25, 43, 44.) The result of the discussion was a vote of refusal to adopt the report of the committee (*fol.* 9,47.) At the annual meeting of January, 1862, the relator renewed his application by a communication in writing, in which he asked to be "permitted to explain any charges preferred or to meet any objections." (*fol.* 10, 49.) The request was declined, and the application for membership rejected (*fol.* 10, 24, 48.) The last publication of the advertisement which was read at the meeting was in January, 1857 (*fol.* 3). The short card which succeeded it was discontinued in January or February, 1859, at which time the relator wholly ceased to advertise in any manner (*fol.* 3). In the year 1858 the relator began to enter upon a general practice of his profession; and from the beginning of the year 1860 his special practice has been discontinued, and his entire attention bestowed on general practice (*fol.* 4, 43).

No notice was ever given by the Society to the relator requiring him to apply for and receive a certificate of admission as a member (*fol.* 20). In February, 1863, the relator obtained at special term an order that the Society show cause why a mandamus should not issue, requiring it to admit him to membership. In March following the motion was heard, and a peremptory mandamus granted; the order for which was affirmed at General Term of the Eighth District.

I.

The admission of the relator is matter of strict legal right.

The statute makes it the duty of every licensed physician of the county to apply for membership in the medical society, and a failure so to do, after due notice given by the President of such society, subjects him to forfeiture of his license, and to all the legal disabilities of unlicensed physicians. (1 Rev. Stat. 856, § 1, 4th Ed. Tit. 7, Chap. 14, Pt. 1.) Pamphlet page 12–13. (Unlicensed physicians on conviction of mal practice or immoral conduct are deemed guilty of misdemeanor, punishable by fine and imprisonment. Laws of 1844, ch. 275, § 4.)

The purpose for which medical societies are constituted is declared in the preamble (Act of April 10, 1813, chap. 94, 1 R. S. 1204, 4th Ed. pamphlet, page 17,) to be "the diffusion of true science, and particularly the knowledge of the healing art;" an intention which embraces within its scope equally all licensed physicians—science and skill in whose vocation the law does not esteem more important in the case of one practitioner (recognized as such by this act) than of another.

By the act of April, 1819, (Pamphlet p. 21) amendatory of § 18 of the former act, respecting assessments for the procuring by the Society of a library and apparatus, and the encouragement of scientific discoveries, the words "collected from each member of the society a sum not exceeding three dollars in any one year," are changed to "collected from *each practicing physician or surgeon residing in the county* or counties where such society is by law established, a sum not exceeding one dollar in any one year;" subjecting to taxation by such society all of that class of persons recognized at the passage of the act as physicians and surgeons, whether members of the society or not; and this on the ground necessarily that the

use of the library and apparatus is designed to be given and the benefit of the scientific discoveries afforded to those subjected to the contribution.

The law intends that every physician shall become a member of the society, and requires the society to admit him. There can be no legal cause for rejecting an applicant regularly qualified to practice, other than such cause as would have been sufficient for his expulsion in the manner provided by law.—Exparte Paine 1, Hill 666. —The People ex. rel. Gray vs. the Medical Society of the County of Erie, 24 Barb. 577, 1 R. S. 856–7. Pamphlet page 13.

In Exparte, Paine, it was considered that the statute (Sec. 1 and 2) imposed a general obligation on the Society to receive every regularly licensed physician resident in the county as a member; and it was observed that the act did not, in terms, allow the society to make any objection. The court esteemed it doubtful whether on any ground whatever the society could legally refuse admission to a properly licensed, and resident applicant; though in that case the exception was made that where it clearly appeared that the character of the applicant was such, that if admitted he would necessarily become immediately subject to expulsion for the offenses and under the form of proceeding specified in the statute, the court perceiving that the writ of mandamus would be ineffectual, in the exercise of its proper discretion would refuse to award it.

The subsequent sections of the statute (2 to 7 inclusive) carefully specify the offenses for which, and prescribe the form of proceedings by which, members can be divested of the franchise There must be preferred against the accused "specific charges of gross ignorance or misconduct in his profession or of immoral conduct or habits;" a presentment must be made by a two-thirds vote of the

society; the charges delivered to the district attorney, by whom a copy is required to be immediately served on the accused with fourteen days notice of the time and place of hearing before the judges of the County Court; the accused to have process for witnesses, and the Court to determine on the charges from the evidence.—By-Laws Erie Medical Society, Art. 7, § 1, 2; Pamphlet p. 10.

In the matter of Smith, in remarking on these provisions, 10 Wend. 458, the Court said : "It (the Statute) prescribes a more formal mode of investigating any imputations against (the society's) members before the right to suspend or expel them shall be exercised; it essentially increases instead of diminishing their security."

It is submitted that the common law grounds of disfranchisement, which might have been exercised by the Society prior to the statute, are comprehended within the terms "gross ignorance, or misconduct, or immoral conduct or habits;" and that the statute designed to provide a single course of procedure by which alone the right of membership should be divested.

The relator has been guilty of no offence for which he could have been proceeded against under the statute. He had done nothing exhibiting "gross ignorance or misconduct," and "immoral conduct or habits" are not pretended.

II

Putting the statute aside and supposing the power of the Society to disfranchise to remain precisely as at common law, this power is carefully defined and restricted to three causes :

1st—Offences against the corporator's duty to the corporation as a member of it.

2d—Offences of a heinous, infamous character affecting the corporator's duty as a subject, being indictable at common law.

3d—Offences compounded of the two.

Grant on Corp., 264.
2 Kent's Com., 297, 299.
24 Barb., S. C. R., 578.
Commonwealth vs. St. Patrick's Benevolent Society, 2 Binney, 448, 450.
Rex vs. Richardson, 1 Burr, 538–9.
Bac. Abr. Corp. E. 9.
Rex vs. Town of Liverpool, 2 Burr., 732.
Fawcet vs. Charles, 13 Wend, 476.

Before the second cause can be made available, there must have been a regular conviction of the offender at common law. The third cause must consist of an offence indictable at law, and a portion of the authorities require an actual indictment or conviction to have been had. Same authorities.

The first cause is excluded in this case by the fact that the relator was never a member of the Medical Society, and could therefore be held to no specific duty towards it. The by-laws applied exclusively to members having notice of their requirements. The relator had not seen hem. Fol. 11.
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Whatever may have been the character of the relator's acts, the Society was accessory to them. The statute imposed upon the corporation the duty of giving the rela-

tor notice within six months after his becoming located in Erie County, requiring him to become a member subject to lawful rules and regulations, under penalty of forfeiting his diploma. (Sec. 1, Pamph. 12.)

This act, by the performance of which the Society was enabled at any time to control the conduct of the relator in conformity with any rightful authority which it possessed, it wholly failed to perform. If the Society voluntarily refrain from taking the legal steps to obtain an influence over the conduct of persons admitted to the practice of medicine and surgery, and in violation of the statute leave them without the advantages which are supposed to be derived from this kind of association, it is precluded from afterwards setting up an irregularity of practice, the continuance of which may be reasonably referred to its own neglect, as a ground of disfranchisement.

But if the relator had been a member of the Society subject to its by-laws, the penalty of disfranchisement could not have been pronounced against him until convicted of a third offence; the first offence merely subjecting him to a *fine of five dollars*. (By-Laws, Art. 7, § 3 Pamph. page 9.

III

But let it be supposed against authority, (Grant on Corp. p. 247,) that a mandamus to admit differs unfavorably from a mandamus to restore, and that on a return to the former the Society may show, that while at the time when the diploma was granted the applicant was duly qualified, since the granting thereof he has ceased to be a fit and proper person to

become a member. If the diploma be not conclusive of the whole matter, presumptively at all events, the relator retains the qualifications attested by his diploma. The burden of establishing that these have been lost or vacated is with the Society; and it must show that it has regularly put the relator on his defence in the premises, and given him on full notice a fair trial and hearing.

King vs University of Cambridge, 2 Ld. Raym. 1347–8.
Grant on Corp. 245, 246, 248.
Regina vs Bailiffs, Burgesses, &c. of Gippo, 2 Ld. Raym. 1240.
Rex vs Town of Liverpool, 2 Burr. 734.
Bentley's case, Str. 557, 2 Ld. Raym. 1334.
Com. vs Penn. Beneficial Inst. 2 S. & R. 141.
Com. vs Guardians of Poor, 6 Serg. Rawle 475, 2 Kent's Com. 298.

The Society must show in particular detail affirmatively that all the proceedings were regularly and legally taken and conducted.

Green vs. Af. Meth. Epis. Society, 1 Serg. & Rawle 254.
Rex vs. Mayor of Liverpool, 2 Burr, 732.
Com. vs. Guardians of the Poor, 6 Serg. & Rawle 475.
Grant on Corp., 248.
Bagg's Case, 11 Coke 99 4th Res. and note. (1.)

The relator was entitled to fully present and advocate his claims before the body which assumed to exercise the function of allowing or rejecting his application. Same authorities. The informal meeting of the relator with a

committee having no power goes for nothing. *Non constat*, that if the Society had yielded to his petition for a personal hearing, its own action would have been equally favorable with the preliminary report of the committee. No opportunity was given to the relator to meet objections for the first time raised at the meeting of the Medical Society. Fols. 44, 45, 46, 47, 48, 49.

Not only must the form of proceeding be shown regular, and the notice and hearing ample, but the grounds of exclusion must affirmatively appear as *sufficient in law.* The authority of the King's Bench to determine on the legal sufficiency of alleged grounds for excluding a suitor from a corporate franchise has been uniformly asserted and exercised. It was never doubted. Though the corporation act upon them after regular investigation as sufficient cause, the court will adjudicate the subject on legal grounds.

Rex vs Richardson, 1 Burr. 540–1.
Rex vs Town of Liverpool, 2 Burr. 731.
Regina vs Bailiffs, &c. of Gippo, 2 Ld. Raym. 1240.
Rex vs Dr. Askew et al. 4 Burr. 2189.
Rex vs Barker, 3 Burr. 1266–7.
Green vs Mayor of Durham, 1 Burr. 131.
Com. vs Guardians of the Poor, 6 Serg. Rawle 475.
1 Serg. & Rawle 254.
Fuller vs Plainfield Academic School, 6 Conn. 546–7.

It does by no means suffice that the causes of exclusion appear sufficient to the corporation; the law must justify them. Otherwise one of the most important rights which the law protects would be changed into a mere license, depending on the exercise of an arbitrary or interested discretion and pleasure. Same authorities.

Leaving out of view any obligation which the by-laws may be deemed to impose on such persons as are amenable to them, what offence has the relator committed? Were the acts complained of against law? To advertise a professional calling may be undignified, but it certainly is not illegal.

For a physician to limit his practice to a certain class of diseases which he may best understand, and which he has made the subject of special study, is not only lawful, but so far from being evidence of quackery, itself is a badge of real science.

As to the mode of treatment which the relator adopted, it was not based on any single proposition or theory; but was simply inclusive of a peculiar remedy deemed important and valuable; as to which, since its introduction professional opinion has been divided. (Fol. 27, 28, 18.) The employment of this remedy is sanctioned by medical writers of established authority in the profession. Illustions of Pulmonary Consumption by Samuel G. ~~Masten~~, Marten page 243–5; Watson's Principles and Practice of Physic, 3 Am. ed. 721; Wood's Dispensatory, page 413; Braithwaite's Retrospect, Jan'y to July, 1840, page 30; Idem. part 19, page 91; Idem. part 16, page 119, 121, 124, et seq; (The Retrospect of Practical Medicine and Surgery, being a half-yearly journal containing a retrospective view of every discovery and practical improvement in the medical sciences. Edited by Wm. Braithwaite.)

If the relator were in error, the law does not impose as the consequence of an error, honestly incurred, an absolute forfeiture of professional rights.

IV.

But whatever estimate may be placed on the relator's course for a certain period after his becoming located in Buffalo, the conclusive answer to all objections is that, at

the time of his application for membership, and for more than two years prior to his final exclusion from the Society, his professional practice had conformed in every respect to the regulations insisted on by the Society. (Fols. 3, 4, 5, 6, 7, 8, 11, 19, 21.) His advertisement had been discontinued. (Fols. 19, 6, 3.) His special practice was changed to a general practice. (Fol. 3.) He had subscribed in writing to the code of ethics, and had observed it. (Fol. 7, 11.) His practice was regular and respectable. (Fol. 13, 19, 30, 31, 32.) He had always professed to hold to the Allopathic system. (Fol. 19, 32.) Had never been associated with any but regularly educated physicians. (Fol. 19.) His obnoxious card, published in ignorance of the Society regulations, had disappeared five years before the final application. (Fol. 48, 3.)

The Society having acquiesced in the relator's course of practice while it continued, could not six years after the offence had ceased, set up the same as accompanied by an absolute forfeiture of the relator's rights; as *per se* a final repudiation of the professional character. There can be no color of authority for the position that without notice, or warning, or any form of trial, or opportunity offered to correct his course, if erroneous, the rights of the relator became at once divested beyond remedy; that the acts complained of in and of themselves worked a permanent and final disqualification to membership.

V

The Medical Society was legally incapable under the statute by which the same was incorporated of restraining by a by-law under penalty of disfranchisement a member of such corporation, (*a fortiori* a person not a member) from giving publicity to his professional calling by an advertisement or card.

The affidavits in opposition, condensed, make a single proposition: that by the code of medical ethics engrafted in the bye-laws of the Medical Society and made a part thereof (considered as the best evidence of medical opinion) it is esteemed as an unprofessional act for a practicing physician to make himself, or any special character of his practice, known to the public through any form of public advertisment. Whether this proposition be sound or not, as a mere matter of ethics, binding, if at all, in conscience, the Medical Society is not invested by the statute with any legal power to require compulsorily the conduct of members to be regulated in conformity with this opinion. The Society was organized, endowed with corporate rights, with the object set forth in the preamble of "*contributing to the diffusion of true science and particularly the knowledge of the healing art*;" it is empowered to hold meetings annually or oftener in the interest of medical science; to elect an annnal delegate to the State Medical Society; to admit students to practice; to hold property real and personal of a value not exceeding $1000, and to collect an annual tax of $1 from each physician of the county for the purpose of procuring "a medical library and apparatus, and for the encouragement of useful discoveries in chemistry, botany and such other improvements as the majority of the Society shall think proper."

Beyond the scope of these general objects of its incorporation, the Society has no powers. The People vs. Utica Ins. Co., 15 Johns., 383, Halsted vs. Mayor, &c., of New York, 3 Com., 433, 2 Kent's Com., 298, Rev. Stat. Tit. 3, Chap. 18, Pt. 1, sec. 1–2, 1 R. S. 1172, 4th ed. And in aid of these objects, and to be construed in accordance therewith, it is enacted that the societies may make such by-laws and regulations relative to the *affairs, concerns and property* of said societies, relative to the admission and expulsion of members, and relative to such donations and contributions as a majority of the members, at their annual meeting, shall think fit and proper,

provided that such by-laws, rules and regulations shall not be contrary to nor inconsistent with the Constitution and Laws of the State or of the United States.

The power to make by-laws relative to the admission and expulsion of members gives to the Society no right of general legislation over the personal conduct of members. The Society cannot in its pleasure erect into a cause of expulsion the breach of a regulation which is foreign to the objects and concerns of the Society. The power to make by-laws is construed as an authority conferred for the purpose of enabling the corporation to accomplish the objects of its creation; and the power in its exercise is to be limited to such objects and purposes.

Ang. & Ames on Corp. 268, 2 Kent 298.
Grant on Corp. 76, People ex rel.
Gray vs Med. Soc. of Co. of Erie, 24 Barb. 575.

This Society has nothing to do with the medium by which a member shall make himself known to the public. And it is no condition, expressly or impliedly annexed to the enjoyment of his franchise, that this shall be by a specified agency not in violation of law rather than another equally lawful. The functions of the Society relate to other and distinct objects, and the same are distinctly specified.

2 Kent's Com., 298–9, and cases cited.
2 Binney, 441.
Ang. & Ames on Corp., 412, 413, 414.

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